May 29, 2002 01-0562

NOTICE OF ADMINISTRATIVE LAW JUDGE'S RULING

Respondent, Commonwealth Edison Company ("ComEd"), filed a Motion for Summary Judgment ("Motion") on November 28, 2001. Complainant, Midwest Generation, L.L.C. ("Midwest"), filed a Response to Commonwealth Edison Company's Motion for Summary Judgment ("Response") and ComEd filed a Reply in Support of Its Motion for Summary Judgment ("Reply").

On February 4, 2002, the Administrative Law Judge ("ALJ") issued a Ruling ("February Ruling") directing the parties to file supplemental briefs addressing specific questions. On April 19, 2002, ComEd filed an "Initial Supplemental Brief in Support of its Motion for Summary Judgment" ("CEISB") and Midwest filed a "Supplemental Brief of Midwest Generation, LLC, in Response to Ruling of the Administrative Law Judge" ("MWISB"). On May 3, 2002, ComEd filed a "Reply to the Supplemental Brief of Midwest Generation, LLC, in Response to Ruling of the Administrative Law Judge" ("CERSB") and Midwest filed a "Reply Supplemental Brief of Midwest Generation, LLC, in Response to Ruling of the Administrative Law Judge" ("MWRSB").

Although the foregoing pleadings are lengthy, it is sufficient for purposes of this ruling to say that ComEd seeks immediate judgment on its behalf and Midwest urges denial of the Motion and requests evidentiary hearings. ComEd asserts three grounds for summary judgment: 1) that the Memoranda of Understanding ("MOUs") at the heart of Midwest's Complaint require arbitration of this dispute; 2) that the Commission is precluded by the Public Utilities Act ("PUA" or "Act") from altering the terms of the MOUs in the manner Midwest requests; and 3) that Midwest has not established a legal or factual basis for the monthly netting of energy. As already noted in the February Ruling, the Motion blends its request for summary judgment with attributes of a dismissal motion. Nevertheless, the February Ruling gave the parties notice that, after supplemental briefing, the Motion would be evaluated under the principles applicable to summary judgment.

1. Arbitration

ComEd's arbitration defense is a threshold issue. If this dispute belongs in arbitration, the Commission should refrain from considering the merits of ComEd's other defenses.

Initially, after reviewing the parties' supplemental briefings, the ALJ reaffirms the conclusion that this issue can appropriately be resolved by summary disposition. The Commission can render summary judgment by applying the same principles that would be applied in the circuit courts of this state. Bloom Township High School v. Illinois Commerce Commission, 309 Ill.App.3d 163, 722 N.E.2d 676, 242 Ill.Dec. 892 (1999).

Summary judgment is appropriately employed "only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Id*., 309 Ill. App.3d at 177, 722 N.E.2d 687, 242 Ill.Dec. 903. In this proceeding, there is no genuine issue of material fact with regard to arbitration. Authenticated copies of the MOUs are attached to the Motion. Motion, Appendix, Tabs 1-12. They contain arbitration provisions. *Id*., section 4. Those provisions merely need to be construed, to determine whether they apply to the dispute framed by the parties here. "Construing a contract is a matter of law suitable for summary judgment." Srivastava v. Russell's Barbecue, Inc., 168 Ill. App. 3d 726, 730, 523 N.E.2d 30, 33, 119 Ill.Dec. 562 (1988).

The first task, therefore, is to determine whether the claims in Midwest's Complaint fall within the ambit of the arbitration provisions in the MOUs. Each MOU contains an identical arbitration provision that states, in subsection (a): "This Section 4 shall provide the exclusive means of resolving any dispute, claim, controversy or failure to agree arising out of, related to, or connected with this MOU, or the breach, interpretation, termination or validity thereof." Contract clauses that, like the foregoing, prescribe arbitration for claims "arising out of" or "relating to" the relevant agreement are "generic" arbitration clauses. Johnson v. Baumgardt, 216 Ill.App.3d 550, 576 N.E.2d 515, 159 Ill.Dec. 846 (1991). "A dispute is within the scope of a 'generic' arbitration clause if it arises out of the subject matter of the contract." *Id*., 216 Ill. App.3d at 559, 576 N.E.2d at 520. The claims in Midwest's Complaint (duress in the execution of the MOUs; terms that unlawfully prohibit self-supply of station service) plainly arise out of the subject matter of the MOUs. Therefore, Midwest's claims are arbitrable under those agreements.

Midwest argues, however, that in view of its claim that it "did not bargain for the MOUs, but rather signed them under duress," it should not be required to honor the arbitration provision of a contract it never wanted. MWISB at 8. ComEd counters that the MOUs' arbitration provisions explicitly extend to disputes concerning "the validity thereof" and that, therefore, a challenge to the formation of the MOUs is, itself, arbitrable. CERSB at 7. ComEd's reading of Section 4 is reasonable and, moreover, consistent with Johnson, *supra*, where the court observed that arbitrators have the parties' threshold authority to "determine the arbitrability of the issues presented." 216 Ill. App. 558, 576 N.E.2d 520.

a.) Is deferral to arbitration either required or prohibited?

Given that Midwest's claims are subject to the arbitration provisions of the MOUs, the next question is whether the Commission *must* step aside in favor of arbitration. ComEd avers that the Commission "is bound to honor the arbitration clause of the MOUs, a requirement that is reinforced by the clear and unambiguous language of the Act." CERSB at 5. ComEd relies principally on subsection 10-101.1(a) of the Act, which states that it is "the intent of the General Assembly to permit and encourage…voluntary binding arbitration of disputes arising under this Act."

ComEd overstates the legal impact of subsection 10-101.1(a). Although it could have done so, the Legislature did not employ language that obligates the Commission to defer to alternative dispute resolution in matters arising under the PUA. Instead, it merely chose to "permit and encourage" the use of alternatives. Furthermore, in subsection (b) of Section 10-101.1(a), the Legislature stated that "nothing in this section shall limit the Commission's authority to conduct such investigations and enter such orders as it shall deem necessary to enforce the provisions of this Act or otherwise protect the public interest." The foregoing statutory language negates ComEd's contention that deference to arbitration is mandatory. Consequently, while the Commission must implement the legislative intent to promote alternative dispute resolution, it need not stay or terminate its own complaint processes in every dispute within its jurisdiction when an arbitration provision is involved.

On the other side of the coin, Midwest takes the position that the Commission is "*required* to hear Midwest's claim, because the matters at issue in Midwest's Amended Complaint are *exclusively* within the Commission's jurisdiction and the public interest." MWISB at 5 (emphasis added). Midwest's assertion of exclusivity is untenable in light of subsection 10-101.1(a), which pertains to "disputes arising under this Act" (the same Act that establishes the Commission's own authority and jurisdiction over this proceeding). Since this dispute arises under the PUA, and since such disputes are expressly arbitrable under subsection 10-101.1(a), the fact that this dispute concerns utility rates and practices does not preclude arbitration.

The authorities on which Midwest relies do not establish that the Commission has exclusive – that is, non-arbitrable – jurisdiction over disputes arising under the Act. They are federal cases and, while not binding on this Commission, might have been strongly persuasive. However, they do not support the proposition that an administrative agency *must* disregard an arbitration provision in a contract involving disputes under agency jurisdiction. In Duke Power Company v. Federal Energy Regulatory Commission, 864 F.2d 823 (D.C. Cir. 1989), the court concluded only that the FERC was "not required to submit the dispute to arbitration despite a mandatory arbitration clause in the agreements constituting the filed rate schedule, although it may, *in its discretion,* do so." 864. F.2d at 830 (emphasis added).

Gulf Oil Corporation v. Federal Power Commission, 563 F.2d 588 (3rd Cir. 1977), comes closer to supporting Midwest's position. The court stated that "the interpretation of Gulf's public service obligation under its certificate…can *only* be within the FPC's exclusive jurisdiction and…*not subject to arbitration*." 563 F.2d at 596 (emphasis added). As the quoted language indicates, the FPC's non-delegable oversight duty specifically attached to enforcement of Gulf Oil's certificate of public convenience and necessity. That enforcement duty, the court ruled, gave the FPC an "independent interest" in Gulf Oil's compliance with its certificate, which was unaffected by the contractual arrangements (including an arbitration provision) between the parties. *Id.*, at 597.

In the present case, however, the enforcement of ComEd's certificate is not at issue, except in the broad sense that ComEd is generally obligated by its certificate to comply with applicable statutes and agency orders[1]. If that were enough to preclude arbitration, subsection 10-101.1(a) would be a nullity, because no dispute with a certificated utility would be arbitrable. Accordingly, to the extent that Gulf Oil is persuasively reasoned, its applicability is limited in Commission complaint proceedings, by virtue of subsection 10.101.1(a), to this proposition: there may be disputes in which the Commission's certificate enforcement duties cannot, even with discretion, be delegated to an arbitrator. Midwest's claims here (contract duress and unlawful contract terms) are not so central to enforcement of ComEd's certificate obligations that arbitration is necessarily precluded[2]. Moreover, since the MOUs have not been filed with the Commission, the Commission's interest in enforcing filed rates is not implicated, as it was in Duke Power, *supra*.

Subsequent to the federal appellate court decisions in Duke Power and Gulf Oil, the United States Supreme Court, in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct 1647, 114 L.Ed.2d 26 (1991), considered the effect of an arbitration agreement in the context of the federal statutes pertaining to age discrimination. Although that case pitted arbitration against judicial dispute resolution, and thus did not address the exclusivity of agency jurisdiction[3], the court articulated principles useful to the instant case. First, the court asserted that "statutory claims may be the subject of an arbitration agreement." 500 U.S. at 26. Second, the court stated that "mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Id*., at 28-29. Third, the court reiterated a prior holding that "having made the bargain to arbitrate, the party should be held to it unless Congress itself had evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id*., at 26. Fourth, the court restated that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id*.

Taken together, the Gilmer principles contravene the rationale for asserting exclusive agency jurisdiction under the PUA. Subsection 10-101.1(a) expresses a state policy favoring arbitration and, importantly, does so in the context of the same statutory matrix that establishes the Commission's jurisdiction. Moreover, there is nothing in the PUA that provides material countervailing evidence of legislative preference for exclusive agency resolution of contract disputes. In fact, claims of duress are not typically, much less exclusively, addressed by the Commission. Contract interpretation issues (in this case, whether the MOUs permit self-supply) are more familiar to the Commission, but hardly exclusive.

[1] In contrast, the certificate in Gulf Oil was associated with a single contract and was, therefore, "in large part defined by the terms of the contract." 563 F.2d at 594.
[2] Whether arbitration should nevertheless be precluded by agency *discretion* is discussed later in this ruling.
[3] In fact, the claimant in Gilmer had previously filed a charge with the relevant agency, the Equal Employment Opportunity Commission.

In sum, neither the PUA nor pertinent federal and state judicial precedents support Midwest's contention that resolution of its claims lies exclusively with the Commission. At the same time, the PUA refutes ComEd's argument that deferral to arbitration is mandatory.

b.) Is discretionary deferral to arbitration warranted here?

The next issue is whether the Commission should, in its discretion, "permit and encourage" arbitration in the instant dispute by deferring to the arbitration provision in the MOUs. Since the parties have already executed an agreement that selects arbitration for dispute resolution, the more precise questions are whether to "permit" arbitration in this specific case and whether to "encourage" arbitration in general by deferring here. To answer these questions, it is initially necessary to identify the appropriate criteria for determining when to defer to a pre-existing arbitration agreement[4]. Two principal criteria emerge from the relevant judicial precedents and from the arguments of the parties: 1) the need for the Commission's specialized expertise; and 2) the broad policy implications of the dispute.

Regarding the first criterion, as already suggested, the Commission's specialized expertise in public utilities regulation is not necessary to resolve a claim of duress in contract formation. Typically, contract formation disputes are addressed by courts of general jurisdiction (or by an arbitrator chosen in lieu of judicial processes). Indeed, this Commission would only entertain a contract duress claim in the context of determining whether the respondent's alleged conduct violated the PUA or a Commission order. Further, to make the threshold finding that the complaining party had been subjected to coercion, the Commission would not look to its own experience with public utilities, but to the common law principles established by the judicial branch in, among other authorities, the cases cited by the parties here. e.g., Higgins v. Brunswick Corp., 76 Ill.App.3d 273, 395 N.E.2d 81 (1979), cited in CEISB at 14, fn.; United Private Detective & Security Assoc. v. Miller, 56 Ill.App.3d 242, 371 N.E.2d 1087, 14 Ill.Dec. 34 (1977), cited in MWRSB at 18.

With respect to whether the Commission's specialized expertise would be essential to resolving Midwest's other claim, the question is closer. Midwest alleges that the MOUs "require Midwest to purchase from ComEd all energy and capacity to serve the auxiliary load at Midwest's generating stations," Amended Complaint, para. 3, that ComEd has thereby "precluded Midwest from supplying its own energy and capacity for station power," *id*., para. 4, and that the FERC has "concluded that a utility cannot require, as a condition of the sale of generating facilities, that the purchaser buy auxiliary power from the selling utility." *Id*., para. 5. In turn, ComEd concedes that

[4] The ALJ is not ignoring Midwest's contention that it did not willingly agree to the arbitration provision (or the MOUs in their entirety) in the first place. The question at this stage of the proceedings, however, is whether Midwest's contention should be addressed by the Commission's complaint processes or in arbitration. That question has to be viewed from an *a priori* perspective – that is, without assuming that Midwest's yet-unproven contention of duress (for which Midwest has the burden of proof) will be proven correct. *See*, United Cable Television v. Northwest Illinois Cable, 128 Ill.2d 301, 538 N.E.2d 547, 131 Ill.Dec. 172 (1989).

"generators enjoy the option to locally or remote [sic] self-supply station power under federal law," CWISB at 18, fn., but denies that the MOUs preclude self-supply of station power. Answer to Amended Complaint at 5-6.

The parties thus frame a question of contract interpretation – do the MOUs obstruct the federal right to self-supply? Since the MOUs are electric energy contracts, their interpretation would inarguably benefit from the Commission's experience and expertise. On the other hand, contract interpretation is regularly performed by the courts and by arbitrators acting in their stead at the request of the parties. This often involves contracts containing technical provisions governed by complex statutory matrices, including the PUA and federal energy statutes. Indeed, the Power Purchase Agreements, pursuant to which ComEd buys the output of Midwest's generating stations, contemplate the arbitration of disputes concerning those agreements. CEISB, Appendix, tabs 1-3. Moreover, the arbitration provisions in the MOUs themselves[5] contemplate an arbitrator "with special knowledge and experience with respect to the matter at issue." Accordingly, even assuming *arguendo* that the Commission is incrementally superior to an arbitrator with respect to interpreting energy contracts, that incremental difference would not be so dramatic as to override both the pro-arbitration policy of subsection 10-101.1(a) and the fact that the parties themselves chose – at least apparently – to arbitrate disputes arising under the MOUs.

The second criterion for determining when to defer to arbitration is whether the dispute raises important policy implications, especially those that would be broadly applicable. Midwest's duress claim, while certainly important, "is one of *fact*, to be judged in light of all the circumstances surrounding *a given transaction*." Schlossberg v. E. L. Trendel & Assoc., 63 Ill.App.3d 939, 943, 380 N.E.2d 950, 953, 20 Ill.Dec. 741, 744 (1978) (emphasis added). Thus, duress allegations do not implicate policymaking. The relevant policy (condemning coercion) has already been made - and made by the judicial branch. The remaining question raised by the parties here is factual and case-specific: was duress applied in this particular instance? A Commission ruling on this question would not have broad application.

Regarding Midwest's allegation that the MOUs preclude self-supply of auxiliary power, the issue is, again, case-specific and will be determined by the terms of these particular agreements (and, if appropriate, extrinsic circumstances). The relevant policy has already been established by the FERC. Midwest is entitled to self-supply[6]. The question is whether the MOUs permit it to do so in this instance. Put another way, the question framed by the parties here is "what *do* the MOUs say," not "what *should* they say." If this Commission decided the former question, rather than deferring to arbitration, it would not be making policy.

[5] Motion, Appendix, tabs 1-12, subsection 4(b)(ii).

[6] The FERC did indicate, in dictum, that its orders do not "prevent a generator from affirmatively choosing to purchase station power from another source rather than self-supplying." Midwest Generation v. Commonwealth Edison Company, Dckt. EL01-109-000, Order, May 15, 2002, at 8. Presumably, coercion would call into question whether Midwest "affirmatively chose" third-party supply in this instance.

This is not to say that a Commission resolution of Midwest's claims would have no policy implications at all. A decision that, for example, defined certain conduct as coercive or interpreted certain contract terms would have some instructive value. However, that would be true of any Commission decision. To overcome the pro-arbitration mandate of subsection 10-101.1(a) and the parties' own apparent agreement to arbitrate, the issues presented must have broader implications for regulatory policy under the PUA than those here. Indeed, if the Legislature believed that every ruling concerning intrastate energy matters had broad policy implications requiring the Commission's immediate oversight, it would not have authorized, as it did in 220 ILCS 5/5-201, civil actions in the circuit courts based on violations of the PUA and Commission regulations. *See*, Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill.App 3d 810, 813, 695 N.E.2d 1339, 1341, 231 Ill.Dec. 220, 222 (1998). By enacting Section 5-201, the Legislature indicated that resolution of disputes under the PUA is not exclusive to the Commission.

In sum, Midwest's claims do not require the Commission's special expertise and do not raise broadly applicable policy issues over which the Commission should retain exclusive control. Therefore, in view of subsection 10-101.1(a) and the parties' apparent intention to arbitrate disputes under the MOUs, the Commission should abstain from further action in this matter at this time.

2. Subsection 16-116 "Contract Service"

As indicated above, ComEd's Motion requests summary judgment on the additional ground that the MOUs are agreements for "contract service," as that term is defined by Section 16-102 of the PUA, which purportedly precludes the Commission, by virtue of subsection 16-116(b), from altering their terms and conditions. In view of the determination in the preceding section of this ruling that this dispute should be resolved by arbitration, no ruling is necessary, and none will be made, with regard to "contract service." Like ComEd's arbitration defense, its "contract service" defense does not resolve the underlying dispute but, rather, asserts that the Commission can, or should, do nothing about it. Since this ruling adopts that premise, insofar as it invokes the Commission's discretion to defer the case to arbitration, a ruling on "contract service" would be superfluous[7].

3. Netting

ComEd's Motion also seeks judgment on Midwest's request that net station service be measured on a monthly basis ("monthly netting"). In a Ruling dated October 26, 2001, in response to ComEd's dismissal motion, the ALJ concluded that Midwest had failed to state a cause of action with respect to its monthly netting request. That

[7] The ALJ notes in passing that a similar issue may arise in arbitration, since subsection 4 (b)(iv) of the MOUs states that an arbitrator "may not change any term or condition of this MOU." That could mean that the arbitrator's only forward-looking remedy (assuming Midwest prevailed) would be termination of the MOUs. If, at that time, ComEd had become an Integrated Distribution Company, it would be prohibited by 83 Ill.Adm.Code 452.230 from entering into a new auxiliary power contract with Midwest. That would appear to be an ironic outcome for this dispute, given that Midwest's Amended Complaint does not pray for termination of the power supply relationship between the parties.

Ruling also permitted Midwest to amend the portions of its complaint dealing with monthly netting, and Midwest did so in the Amended Complaint.

Given the foregoing ruling on ComEd's arbitration defense, there is no reason to rule on summary judgment with respect to monthly netting. As a substantive issue, any determination of an appropriate netting interval is a matter for the arbitrator.

There is, moreover, an additional reason for declining to rule on ComEd's netting defense. The allegations pertaining to monthly netting in the Amended Complaint (paragraphs 6 and 12) do not present an independent basis for awarding relief. Instead, Midwest alleges that the MOUs preclude *all* netting, a claim that substantively duplicates Midwest's claim that the MOUs preclude self-supply. The Amended Complaint neither alleges, nor offers facts to show, that the absence of *monthly* netting is, by itself, improper, either under the PUA or FERC decisions. Consequently, the Amended Complaint appears to say only this: if the Commission finds that the MOUs improperly preclude netting (or self-supply) altogether, Midwest's preferred remedy would include monthly netting.

Therefore, the ALJ concludes that the Amended Complaint addresses monthly netting solely as a remedy. Accordingly, there is no need to rule on ComEd's Motion with respect to this issue. Irrespective of whether ComEd is correct that, under Rumford Power Associates, L.P., 97 FERC 61,173 (Nov. 9, 2001), monthly netting is not required by FERC, monthly netting would be a permissible remedy under PJM Interconnection, LLC, et al ("PJM II"), 94 FERC 61,251 (March 14, 2001).

4. Termination, Stay and Interlocutory Review

In view of the foregoing discussion, the next question is whether to terminate this proceeding by Commission order or hold it in abeyance while Midwest either resorts to arbitration or ends the underlying dispute. At this juncture, the ALJ is willing to consider either course, each of which has its own practical ramifications.

If this docket were to be terminated, the ALJ would incorporate the substance of this ruling in a proposed order for Commission approval. The parties could file exceptions to that order, as well as rehearing motions if the order were adopted by the Commission. Appellate review could follow. Meanwhile, Midwest might submit the dispute to arbitration. If, for some reason, the arbitrator attempted to return the matter to the Commission, Midwest might have to (or prefer to) file a new complaint. The PUA's statutes of limitation would apply to Midwest's reparations request, but so, too, would the continuing violation doctrine, adopted by the Commission in Chicago Housing Authority v. Ameritech, Dckt. 99-0429, Order, May 25, 2001.

Alternatively, this case could, pursuant to this ruling alone, be held in abeyance pending the outcome of any arbitration. If an arbitrator attempted to return the case to the Commission, there would be an existing docket to re-activate. However, the parties

would need to execute a waiver (or series of waivers) of the one-year rule in 220 ILCS 5/10-108.

Of course, the parties are free to request interlocutory review of this ruling. If unsuccessful, though, they would be returned to the crossroads between termination and stay. If the case were then terminated, they might wind up repeating the arguments made during interlocutory appeal. Under 83 Ill.Adm.Code 200.520, a request for interlocutory review is not required in order to preserve objection to a proposed or final Commission order.

Having set out the foregoing (which is not intended to be a complete discussion of the procedural possibilities), the ALJ hereby directs the parties to file briefs proposing courses of action, assuming that there is no interlocutory appeal. However, no briefing schedule will be established until the time for interlocutory appeal under 83 Ill.Adm.Code 200.520 has expired or the parties notify the ALJ that no interlocutory appeal will be filed, whichever occurs first.

5. Summary

ComEd's Motion is granted with regard to arbitration. As a result, this proceeding will either be terminated by Commission order or stayed pursuant to this ruling while the parties arbitrate or negotiate. The parties will provide briefings addressing these procedural alternatives, but not unless and until interlocutory review is either waived by the parties or denied by the Commission. Because of the foregoing ruling regarding arbitration, no ruling will be made with regard to ComEd's "contract service" defense and defense against monthly netting. In addition, no ruling will be made regarding the latter defense because Midwest has presented monthly netting solely as a discretionary remedy for the substantive violations it alleges.

DG:jt